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this Memorandum Decision shall not be
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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID J. GARDNER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 47A01-0603-CR-118

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable Richard D. McIntyre, Senior Judge
Cause No. 47C01-8903-CF-27

September 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

David J. Gardner appeals from the post-conviction court's dismissal of his Petition for Leave to File Belated Notice of Appeal regarding a sixty-year sentence for murder imposed upon him under the terms of a plea agreement. Gardner asserts that the post-conviction court erred in concluding that he was not sentenced under an "open" plea agreement, therefore precluding his attempt to directly appeal his sentence. Because the sentencing court retained discretion to determine Gardner's sentence, we reverse.

Facts and Procedural History

In early March of 1989, Gardner stabbed and killed his wife. He was charged with murder, and the State sought the death penalty. On August 15, 1990, Gardner and the State entered into a plea agreement under which Gardner agreed to plead guilty to murder in exchange for the State's dismissal of its request for the death penalty. Instead, the State recommended the maximum sentence of sixty years. The sentencing court accepted the plea agreement, and on September 17, 1990, after considering aggravating and mitigating circumstances, imposed the maximum sixty-year sentence upon Gardner.

On August 15, 2004, Gardner filed, pro se, a Petition for Leave to File a Belated Notice of Appeal. He alleged that his sentence was the result of an open plea, and that he was "specifically instructed that he would be waiving his right to pursue a direct appeal." Appendix to Appellant's Brief at 8 (emphasis included). On November 29, 2005, the post-conviction court ordered a hearing on the matter, scheduled for January 12, 2006, after finding that Gardner "filed no supporting documents (i.e., excerpts from transcripts or

affidavits).” Id. at 12. It also gave Gardner thirty days from the date of the order to file supporting documents.¹ Appellate counsel was appointed to Gardner on December 12, 2005, at his request. The hearing set for January 12, 2006, was reset for March 6, 2006.

On February 6, 2006, one month prior to the scheduled hearing, the State filed a motion to dismiss Gardner’s petition. The State argued only that Gardner’s sentence was not imposed under an open plea agreement, but rather was for a determinate term of sixty years. On February 14, 2006, the post-conviction court granted the State’s motion and summarily dismissed Gardner’s petition. On March 6, 2006, Gardner filed a motion treated as a Motion to Correct Error, which was denied the following day. This appeal ensued.

Discussion and Decision

Denial of a petition to file a belated notice of appeal is within the post-conviction court’s discretion. *Tredway v. State*, 579 N.E.2d 88, 90 (Ind. Ct. App. 1991), trans. denied. We will reverse only for an abuse of discretion or a decision rendered contrary to law. *Long v. State*, 570 N.E.2d 1316, 1318 (Ind. Ct. App. 1991). We do not reweigh the evidence in determining whether the post-conviction court abused its discretion. *Tredway*, 579 N.E.2d at 90.

Here, the post-conviction court’s dismissal of Gardner’s petition was based on the State’s argument that Gardner’s sentence did not result from an open plea agreement. “A plea agreement where the issue of sentencing is left to the trial court’s discretion is often referred to as an ‘open plea.’” *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004). The State’s

¹ It is unclear whether Gardner complied within the thirty-day period.

assertion was clearly erroneous. Although the State recommended the maximum sentence of sixty years, the ultimate decision of a term between thirty and sixty years was left to the discretion of the sentencing court. After concluding that the mitigating factors were outweighed by the aggravating circumstances, it chose to impose the maximum sentence. As such, Gardner is not foreclosed from pursuing leave to file a belated notice of appeal. In fact, the State concedes this in its brief.

Conclusion

The post-conviction court improperly dismissed Gardner's Petition for Leave to File a Belated Notice of Appeal. Consequently, we reverse and remand for a hearing and determination on the matter as provided for by the post-conviction court before its dismissal of Gardner's petition.

Reversed and remanded.

SHARPNACK, J., and NAJAM, J., concur.